No. 3979/C2/87

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice,

Monday, 6th March, 1989.

Before:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Lane)

MR. JUSTICE KENNEDY

and

MR. JUSTICE HUTCHISON

R E G I N A

-v-

SATPAL RAM

(Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd.,
Pemberton House, East Harding Street, London, EC4A 3AS.
Telephone Number: 01-583 7635. Shorthand Writers to the Court.)

MR. P. O'CONNOR appeared on behalf of the Applicant.

J U D G M E N T

(As approved by Judge)

MR. JUSTICE KENNEDY: On 10th June 1987 in the Crown Court at Birmingham, this applicant was convicted of murder and sentenced to life imprisonment.

He now renews his application for leave to appeal against conviction, following refusal by the single Judge.

The sole point which arises at this stage is whether it is arguable that there was a material irregularity in the conduct of the trial, arising out of the failure of leading counsel for the defence to ask for the services of an interpreter when it transpired that a witness, tendered by the Crown and being cross-examined by the defence, was proving very difficult to understand.

What counsel did was to give up the attempt to get the witness to give intelligible evidence, and the witness in effect dropped out of the case. His evidence was not even mentioned by the Judge in the summing up. However Mr. O'Connor, who did not appear at the trial, and who has made most helpful submisisons to us, contends that it was clear from the statement given by the witness to the polilce, which was of course in the possession of defence counsel at the trial, that the witness could have given material evidence which would have assisted the defence and so this Court should now intervene.

The first thing that has to be said is that it is not the function of this Court to review, still less to pass judgment upon, the advocacy of counsel who appear for the defendant at the trial. In R.v. Irwin (unreported - 19th February 1987), defence counsel at a retrial decided without consulting his client not to call alibi witnesses, and this Court made it clear that the question on appeal was not whether counsel was right in thinking that the witnesses should not be called, but whether he was entitled to bind his client by his decision. The Court decided that the client should have been consulted and because in that case the first trial, at which the witnesses were called, had ended in a disagreement the Court felt unable to say that if the witnesses had been called at the

second trial that the result would have been the same.

A week later, on 27th February 1987, another division of this Court, presided over by the Lord Chief Justice, heard the appeal of Gautam (unreported - 27th February 1987), a shoplifting case in which on appeal trial counsel was criticised for failing to advance a medical defence. At the hearing of the appeal counsel for the appellant contended that what mattered was whether the appellant had any sense of grievance, whether he felt that matters were not handled as they should have been rather than purely objectively, whether the verdict of the jury was safe and satisfactory.

After referring to the recently decided case of Irwin, Mr. Justice Taylor (as he then was), giving the judgment of the Court, said: ".... it should be clearly understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for an appeal."

That observation, which we would adopt, creates a considerable obstacle for the applicant in the present case.

The second point which has to be made is that this application is in essence an application to admit evidence which was not led before the jury, but which to the knowledge of defence counsel was available at the time of trial, and that means that the applicant cannot meet a requirement which in most cases must be satisfied before fresh evidence will be admitted.

In so far as it is argued that the evidence was not available because the witness was unintelligible, it must be remembered that defence counsel had a statement the original of which could have been put to the witness or, as Mr. O'Connor has suggested, defence counsel could have asked the prosecution if the statement could have been read, and defence counsel could, if he had considered it to be helpful to do so, have asked for an interpreter.

It is noteworthy that Mr. Mozomil, the witness in question, gave evidence on Monday the 8th of June 1987, and the prosecution case did not conclude

that day. So presumably it would have been practicable for the witness to have been stood down and recalled with an interpreter on the following day, thus ensuring that there was no significant delay in the progress of the trial.

But plainly defence counsel who appeared at the trial did not consider it necessary to seek the services of an interpreter, which no doubt he would have done if he had been of the opinion that Mr. Mozomil could make a significant contribution to the defence case.

Even if the applicant could overcome the problems which he faces when trying to persuade this Court to review a decision taken by defence counsel at the trial and the equally substantial problem which he faces when trying to persuade this Court to admit evidence which plainly was available at the time of the trial, he would still be faced with the problem of trying to show that the effect of the fresh evidence which he now wishes to have introduced is that the conviction is thereby rendered unsafe and unsatisfactory.

In order to deal with this third aspect of the case it is necessary to say a little more about the facts. At about 2.30 a.m. on Sunday 16th November 1986 the deceased, Clarke Edward Pearce, was one of a party of six at a table in the Sky Blue restaurant, Lozells Road, Birmingham. At another table was the applicant, Satpal Ram, with Navinder Singh Shinji and Evelyn Schneider. At a third table, some distance away, were two men, named Mark Trace and Mark Stenson. At a fourth table, next to the applicant's table, was a man named Stuart Bishop. The manager of the restaurant was a man named Sultan Ahmed. Abdul Mozamil, the witness from whom Mr. O'Connor contends more should have been heard, was a waiter.

Undoubtedly an incident occurred which began with the deceased being offensive about the Indian music and with the applicant asking for the volume to be increased. The incident was short-lived, and it ended with the applicant having a cut face and with the deceased having not only a cut face but also two stab wounds, one to the front of his chest and one to his back, just beneath the left shoulder blade.

At the trial the only issue was provocation, and there was evidence that the deceased, who was a larger man than the applicant, did behave provocatively. In addition to making racial offensive remarks about the music, he probably initiated the violence by moving towards the applicant armed with a glass which may well have been broken. Miss Schneider was somewhat reluctant to say that the provocative conduct of the deceased did cause the applicant to lose his self-control. Even assuming for present purposes that the jury found that it had that effect, the principal difficulty which confronted the defence at the trial must have been the difficulty of persuading the jury that the prosecution was wrong in its contention that the provocative conduct of the deceased was not such as to cause a reasonably sober man to do as the applicant did.

In the first place the evidence suggested that the applicant was not sober. Less than two hours after the killing he was so patently drunk and obstructive that a doctor refused to treat him. Secondly, there was clear evidence that the applicant had carried, and had used a knife, which Miss Schneider described as a flick knife, and that he had used it to inflict two severe blows, the fatal one being to the back of the victim and a blow which, according to the pathologist, could not have been delivered when the applicant and victim were face to face.

Thirdly there was clear evidence that when the deceased was on the floor mortally wounded, the applicant was saying in effect that he hoped he had killed the deceased.

When interviewed by the police eight days later, the applicant claimed only to have used a pen knife defensively, and he gave no real explanation for most of the injuries sustained by the deceased. He chose, as he was entitled to, not to give evidence and he was convicted by a jury which was unanimous, after a retirement of one hour 25 minutes.

Against that background we turn to look at the passages in the witness statement of Mr. Mozomil, Mr. O'Connor would have liked the jury to have

heard. It reads as follows:

"On my last trip to the kitchen I saw one of the men from table 10 [the deceased], get up to go towards table 7. This man had been sitting nearest the bar. I saw that he had an empty wine glass in his hand. The Asian man on table 7, the one with the short hair [the applicant], also stood up and the two men were swearing and shouting at each other. I cannnot remember what was said. I saw the white man hit the Asian man over the head with the glass he had in his hand. The glass broke and the Asian man began to bleed. The two men then began to fight, punching each other. One of the women from table 10 stood up and started shouting and swearing and also joined in fighting. She was shouting 'Fucking bastard, black bastard'. She was fat and had been sitting the middle of the three women. I then saw that both the Asian man and the white man were both holding knives. They looked like table knives. The Asian had been eating steak and I think he was holding the table steak knife. I didn't see anyone being stabbed but both men became covered in blood."

A little later Mr. Mozomil said: "I have seen the two Asian youths from table 7 in the restaurant about two times before tonight. The last time was about five or six weeks ago. On the times they have been before they have been very abusive towards the waiters. I would be able to recognise them both again."

The latter passage Mr. O'Connor seeks to make use of becaue he submits it shows that this witness was not prejudiced in favour of the applicant in this case. There is obvious force in that point.

He says that the evidence helps because it adds substantially to what the other witnesses said, that it introduces the idea of the deceased having picked up the table knife, but it has to be conceded that the witness is clearly wrong in suggesting that that was the weapon which was in the hands of the applicant. Further he submits that here is a witness who, in the course of his duties as a waiter, serving the table at which he had

served a moment or two before clearly had a very good view.

It is however necessary to bear in mind that this jury heard evidence not only from Mr. Mozomil, but also from all of those witnesses in the restaurant whose names we have mentioned, other than the applicant himself and Shinji. Against that background it seems to us that the missing evidence of Mr. Mozomil, if it can be so described, is not evidence which can possibly lead any Court to say that this Cnviction was unsafe and unsatisfactory.

Viewing this matter in the context of section 23 of the Criminal Appeal Act, one has to say in respect to subsection (1) that this cannot be regarded as a case where it is necessary or expedient in the interests of justice for this Court to intervene. In the context of subsection (2), this is not a case in which there is a reasonable explanation for the failure to introduce the evicence at first instance.

Accordingly this application fails and is refused.

MR. O'CONNOR: May I make an ancillary application, and it is this. There has been, rightly or wrongly, fairly considerable concern about this conviction and one is grateful for my Lord's judgment, which set out clearly many of the circumstances of which perhaps some people were not aware. In my submission it is important that such generalised concern be channelled professionally into arguable and proper legal grounds of appeal. Legal aid has not been available for the preparation and presentation of this application today. I merely invite your Lordships to consider granting legal aid for that purpose, which of course ends today.

THE LORD CHIEF JUSTICE: Yes, you may have legal aid.